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CONSTITUTIONAL SOURCES OF THE LAWS OF WAR

ARTICLE

ON

THE CONSTITUTIONAL SOURCES OF THE LAWS OF WAR

BY

HORACE L. B. ATKISSON

PRESENTED BY MR. FLETCHER

JUNE 9, 1917.—Referred to the Committee on Printing

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SENATE RESOLUTION NO. 100.

(REPORTED BY MR. FLETCHER.)

IN THE SENATE OF THE UNITED STATES,
September 11, 1917.

Resolved, That the manuscript submitted by the Senator from Florida (Mr. Fletcher) on June 9, 1917, entitled "Constitutional Sources of the Laws of War," by Horace L. B. Atkisson, of the Washington, D. C., bar, be printed as a Senate document.

Attest:

JAMES M. BAKER,
Secretary.

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CONSTITUTIONAL SOURCES OF THE LAWS OF WAR.

BY HORACE L. B. ATKISSON,

OF THE WASHINGTON, D. C., BAR.

POWERS OF CONGRESS.

"The Congress shall have power * * * to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations." (Art. I, sec. 8, clause 10.)

This is one of the clauses of the Constitution that give to Congress authority to protect the commerce of the United States. Congress is vested in express terms with power to regulate commerce, and to make all laws proper and necessary to carry that power into effect, to the extent of giving full protection thereto by its criminal jurisprudence.

Charge to Grand Jury, 2 Sprague (U. S.), 279; 30 Fed. Cas. No. 18256.

Piracy is universally understood in the law of nations as robbery or a forcible depredation on the high seas, *animo furandi*. It is the same offense at sea with robbery on land.

1 Kent, 183; 4 Blackstone, 71, 73.

A statute for the punishment of piracy, "as defined by the law of nations," is sufficient without further definition.

U. S. *v.* Smith, 5 Wheaton, 153; U. S. *v.* Brig Malek Adhel, 2 Howard, 210.

While Congress is given power to define and punish, it is not necessary, in order to make a valid statute, that upon the face of the statute it name the acts denounced as offenses against the law of nations. It is enough if the statute describes the act, and denounces it with punishment, and that the act in its nature comes within the scope of international obligations.

U. S. *v.* White, 27 Fed. Rep., 203.

The manifest purpose of this provision is to empower Congress to provide for the punishment as crimes of all such infamous acts committed on the high seas as constitute offenses against the United States or against all nations.

1 Kent, 188.

An act of Congress providing "that if any person or persons whatsoever shall, upon the high seas commit the crime of piracy as defined by the law of nations, and such offender or offenders shall be brought into or found in the United States, every such offender or offenders shall, upon conviction thereof, etc., be punished with death," is not unconstitutional in leaving the offense to be defined by the law of nations.

In U. S. *v.* Smith (5 Wheaton, at page 157), the court said:

> To define piracies, in the sense of the Constitution, is merely to enumerate the crimes which shall constitute piracy; and this may be done either by a reference to crimes having a technical name and determinate extent, or by enumerating the acts in detail upon which the punishment is inflicted.

When an act of Congress, making it an offense to endeavor to make a revolt on the high seas, does not define the offense, it is competent for the court to give a judicial definition of it.

U. S. *v.* Kelly, 11 Wheaton, 417.

Murder or robbery committed on the high seas may be an offense cognizable by the courts of the United States, although it was committed on board of a vessel not belonging to citizens of the United States, as if the vessel had no national character, but was possessed and held by pirates, or persons not lawfully sailing under the flag of any foreign nation.

U. S. *v.* Holmes, 5 Wheaton, 417.

Robbery committed on a ship belonging to subjects of a foreign State by one not a citizen of the United States, is a crime only against such foreign State, and not punishable in the courts of the United States.

U. S. *v.* Palmer, 3 Wheaton, 610; U. S. *v.* Kessler, Baldwin, 15, 22.

Murder committed at sea on board a foreign vessel is not punishable by the laws of the United States if committed by a foreigner upon a foreigner, but otherwise as to piracy, for that is a crime within the acknowledged reach of the punishing power of Congress. In U. S. *v.* Bowers (5 Wheaton, 198), the court said:

> Nor is it any objection to this opinion, that the law declares murder to be piracy. These are things so essentially different in their nature, that not even the omnipotence of legislative power can confound or identify them. Had Congress, in this instance, declared piracy to be murder, the absurdity would have been felt and acknowledged; yet with a view to the exercise of jurisdiction, it would have been more defensible than the reverse, for in one case it would restrict the acknowledged scope of its legitimate powers, in the other extend it. If, by calling murder piracy, it might assert a jurisdiction over that offense committed by a foreigner in a foreign vessel, what offense might not be brought within their power by the same device? The most offensive interference with the government of other nations might be defended on the precedent. Upon the whole, I am satisfied that Congress neither intended to punish murder in cases with which they had no right to interfere, nor leave unpunished the crime of piracy in any cases in which they might punish it.

By high seas are meant all tidewaters below low-water mark.

U. S. *v.* Pirates, 5 Wheaton, 184; U. S. *v.* Wiltberger, 5 Wheaton, 76, 94.

Where an American citizen has discovered an unoccupied guano island, which the President under authority of Congress has recognized as part of the United States, Congress may ordain that crimes committed there shall be considered as though committed on a domestic vessel on the high seas.

Jones *v.* U. S., 137 U. S., 202.

The law of nations requires every national government to use "due diligence" to prevent a wrong being done within its own dominion to another nation with which it is at peace, or to the people thereof; and because of this the obligation of one nation to

punish those who, within its own jurisdiction, counterfeit the money of another nation has long been recognized.

U. S. *v.* Arizona, 120 U. S., 484.

And this applies with equal force to counterfeiting the securities of a foreign nation.

U. S. *v.* White, 27 Fed. Rep., 201.

And to counterfeiting notes of a foreign bank or corporation, or having in possession the plates from which may be printed counterfeits of the notes of foreign banks or corporations, whether such securities are national, municipal, or corporate.

U. S. *v.* Arizona, 120 U. S., 483.

The power of the United States to pass and enforce a statute protecting rights secured by the law of nations does not prevent a State from providing punishment for the same thing.

U. S. *v.* Arizona, 120 U. S., 487.
People *v.* McDonnell, 80 Cal., 285.

CLAUSE 11.

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.

War is "that state in which a nation prosecutes its right by force."

The Prize Cases, 2 Black, 635, 666.

It may exist without being declared, through the hostile acts of a foreign power or through armed insurrection, and may then be recognized and repelled by the President as Commander in Chief of the Army and Navy.

The Prize Cases, 2 Black, 635, 668.

The rule that in the enforcement of provisions guaranteeing civil rights, Congress is limited to the enactment of legislation corrective of any wrong committed by the States and not by the individuals, does not apply to those cases in which Congress is clothed with direct and plenary powers of legislation over the whole subject, accompanied with an express or implied denial of such powers to the States, as in the regulation of commerce, * * * the coining of money, the declaring of war, etc. In these cases Congress has power to pass laws for regulating the subjects specified in every detail and the conduct and transactions of individuals in respect thereof.

Civil Rights Cases, 109 U. S., 18.

The existence of war and the restoration of peace are to be determined by the political department of the Government, and such determination is binding and conclusive upon the courts, and deprives the courts of the power of hearing proof and determining as a question of fact either that war exists or has ceased to exist.

Perkins *v.* Rogers, 35 Ind., 167.

In this case the court said:

The war-making power is, by the Constitution, vested in Congress, and the President has no power to declare war or conclude peace, except as he may be empowered by Congress.

When Congress declares war, by that declaration it puts in force the laws of war; and the war powers of the Government, which are not to be exercised, under the Constitution, in time of peace, now come into full force, by virtue of the Constitution, and are to be exerted by the President and Congress. After the declaration of war, every act done in carrying on the war is an act done by virtue of the Constitution, which authorized the war to be commenced. Every measure of Congress, and every executive act performed by the President, intended and calculated to carry the war to a successful issue, are acts done under the Constitution; whether the act or the measure be for the raising of money to support armies, or a declaration of freedom to fill their ranks and weaken the enemy: whether it be the organization of military tribunals to try traitors, or the destruction of their property by the advancing army, without due process of law; and the validity of such acts must be determined by the Constitution.

McCormick *v.* Humphrey, 27 Ind., 154.

By the Constitution, Congress alone has the power to declare a national or foreign war. It can not declare war against a State, or any number of States, by virtue of any clause in the Constitution. The Constitution confers on the President the whole executive power. He is bound to take care that the laws be faithfully executed. He is Commander in Chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States.

The Brig Amy Warwick, 2 Black (U. S.), 668.

It is the exclusive province of Congress to declare war, but the right to repel invasions arises from self-preservation and defense, which is a primary law of nature and constitutes part of the law of nations. It, therefore, becomes the duty of a people, and particularly of the Executive Magistrate, who is at their head, and Commander in Chief of the forces by sea and land, to repel aggressions and invasions.

People *v.* Smith (U. S. Cir. Ct. 1806), 3 Wheel. Crim. (N. Y.), 100; 27 Fed. Cas., No. 16342.

Letters of marque and reprisal are sometimes issued with a view to obtain redress for some national injury without resort to further hostile measures. Unless rules are made concerning captures and confiscations, no private citizen can enforce rights of forfeiture, either with or without judicial assistance. A declaration of war is not an expression of the will of Congress that reprisals may be made.

Brown *v.* U. S., 8 Cranch, 110.

In the absence of an act of Congress there is no right to prize in property captured by vessels of the United States.

While the American colonies were a part of the British Empire the English maritime law, including the law of prize, was the maritime law of this country. From the close of the Revolution down to this time it has continued to be our law, so far as it is adapted to the altered circumstances and condition of the country, and has not been modified by the proper national authorities. In our jurisprudence there are, strictly speaking, no droits of admiralty. The United States have succeeded to the rights of the Crown. No one can have any right or interest in any prize except by their grant or permission. All captures made without their express authority inure

ipso facto to their benefit. Whenever a claim is set up its sanction by an act of Congress must be shown. If no such act can be produced the alleged right does not exist. The United States take captured property, not as droits, but strictly and solely jure reipublicæ. (*The Siren*, 13 Wallace, 392. See also *The Hampton*, 5 Wallace, 376.)

But as a legitimate means of prosecuting war the property of a belligerent may be seized and confiscated, and disposed of absolutely at the will of the captor.

Miller *v.* U. S., 11 Wallace, 268.
Tyler *v.* Defrees, 11 Wallace, 331.

The power given by this clause is granted in the largest terms, and without any expressed limitation. By section 2 of the act of March 3, 1863, providing "that the Secretary of the Navy or the Secretary of War shall be, and they, or either of them, are hereby authorized to take any captured vessel, any arms or munitions of war, or other material for the use of the Government; and when the same shall have been taken, before being sent in for adjudication, or afterwards, the department for whose use it was taken shall deposit the value of the same in the Treasury of the United States, subject to the order of the court in which prize proceedings shall be taken in the case; and when there is a final decree of distribution in the prize court, or if no proceedings in prize shall be taken, the money shall be credited to the Navy Department, to be distributed according to law," the authority of Congress was not exceeded.

Appropriation of captured property by the War and other departments, 10 Op. Atty. Gen., 519.

War gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found. The investigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but can not impair the right itself. That remains undiminished, and when the sovereign authority shall choose to bring it into operation, the judicial department must give effect to its will. But until that will shall be expressed, no power of condemnation can exist in the court.

In Brown *v.* U. S. (8 Cranch, 122) the court said:

It would be restraining this clause within narrower limits than the words themselves import to say that the power to make rules concerning captures on land and water is to be confined to captures which are extraterritorial. If it extends to rules respecting enemy property found within the territory, then we perceive an express grant to Congress of the power in question as to an independent substantial power, not included in that of declaring war.

And, again, page 125:

That the declaration of war has only the effect of placing the two nations in a state of hostility, of producing a state of war, of giving those rights which war confers; but not of operating, by its own force, any of those results, such as a transfer of property, which are usually produced by ulterior measures of government, is fairly deducible from the enumerated powers which accompany that of declaring war.

The mere declaration of war does not confiscate enemy property or debts due to an enemy, nor does it vest the property or debts in the Government, as to support judicial proceedings for the confiscation of property or debts, without the expression of the will of the Government, through its proper department to that effect. Under

the Constitution of the United States, the power of confiscating enemy property and debts due to an enemy is in Congress alone.

Butler *v.* Butler, 9 Blatchf. (U. S.), 456; 4 Fed. Cas. No. 1903.

Enemy property found within the United States on the breaking out of war can not be confiscated without an act of Congress authorizing such confiscation.

Wagner *v.* Schooner Juanita, Newb. Adm., 352; 28 Fed. Cas. No. 17039.
U. S. *v.* Stevenson, 3 Ben. (U. S.), 119; 27 Fed. Cas. No. 16396.
U. S. *v.* 1,756 Shares of Capital Stock, 5 Blatchf. (U. S.), 231; 27 Fed. Cas. No. 15961.

The act of Congress of July 13, 1861, authorizing the President to proclaim and declare "the inhabitants" of certain States "or any section or part thereof," to be in a state of insurrection against the United States, and thereupon all commercial intercourse, by and between the same and the citizens thereof and the citizens of the rest of the United States, shall cease and be unlawful so long as such condition of hostility shall continue; and all goods, etc., coming from said State or section into the other parts of the United States, and all proceeding to such State or section, by land or water, shall, together with the vessel or vehicle conveying the same, or conveying persons to or from such State or section, be forfeited to the United States, was held to be a lawful valid exercise of legislative power; for the Congress of the United States was not, by the rebellion, deprived of the authority to legislate in this manner with a view to its suppression.

Brown *v.* Hiatt, 1 Dill (U. S.), 372; 4 Fed. Cas., No. 2011.
The Ned, 1 Blatchf., Prize Cas., 119; 17 Fed. Cas., No. 10078.

The act of Congress of July 17, 1862, providing that "all slaves of persons who shall hereafter be engaged in rebellion against the Government of the United States, or who shall in any way give aid or comfort thereto, escaping from such persons and taking refuge within the lines of the Army; and all slaves captured from such persons, or deserted by them, and coming under the control of the Government of the United States, and all slaves of such persons found or being within any place occupied by rebel forces and afterwards occupied by the forces of the United States, shall be deemed captures of war, and shall be forever free of their servitude and not again held as slaves," was held to be valid, as a state of war existed.

Bine *v.* Parker, 63 N. Car., 131.

This right of confiscation exists in favor of the United States in respect to its citizens engaged in rebellion against its authority.

The Prize Cases, 2 Black, 635, 673.
The Grapeshot, 9 Wall., 129, 132.

As a war measure the slaves of persons in rebellion may be given their freedom.

Slabach *v.* Cushman, 12 Fla., 472.
Dorris *v.* Grace, 24 Ark., 326.
Weaver *v.* Lapsley, 42 Ala., 601.
Hall *v.* Keese, 31 Texas, 504.

When war exists the Government possesses and may exercise all those extreme powers which any sovereignty can wield under the

rules of war recognized by the civilized world. Among these is the power to acquire territory either by conquest or by treaty.

Am. Ins. Co. *v.* Canter, 1 Pet., 511, 542.

The power to declare war was not conferred upon Congress for the purpose of aggression or aggrandizement but to enable the General Government to vindicate by arms, if it should become necessary, its own rights and the rights of its citizens. A war, therefore, declared by Congress can never be presumed to be waged for the purpose of conquest or the acquisition of territory; nor does the law declaring the war imply an authority to the President to enlarge the limits of the United States by subjugating the enemy's country. The United States, it is true, may extend its boundaries by conquest or treaty, and may demand the cession of territory as the condition of peace, in order to indemnify its citizens for the injuries they have suffered or to reimburse the Government for the expenses of the war. But this can be done only by the treaty-making power or the legislative authority, and it is not a part of the power conferred upon the President by the declaration of war.

Fleming *v.* Page, 9 Howard, 614.

As a limitation upon the power of Congress, this distinction may, practically, be unimportant. As every war in which the country may be engaged must be regarded by all branches of the Government, and even by neutrals, as a just war, and as nations can readily cloak a spirit of rapacity and aggression under professions of justice and moderation, it is at all times easy, should our country be actuated by such a spirit, to declare an aggressive war, to be undertaken in self-defense and an intended conquest to be desired only as a compensation for past or security against future injuries. But the distinction is important when a court is asked to presume that conquest was the object of the war. Under our Government, at least, such a presumption can not be indulged.

U. S. *v.* Costillero, 2 Black (U. S.), 355.

This clause of the Constitution gives Congress the power to establish provisional courts in conquered territory.

Jecker *v.* Montgomery, 13 Howard, 498.
The Grapeshot, 9 Wallace, 129.

Also to create military commissions for the trial of military and other offenses in districts where the civil law is displaced by warlike operations. But there is and can be no power to displace the Constitution where the civil courts are discharging their functions and can enforce them.

Exparte Milligan, 4 Wallace, 2.

As to the power of Congress to establish military tribunals, Chief Justice Chase, in an opinion concurring in the order made in the cause, but not concurring in some particulars with the opinion of the court, said:

What we have already said sufficiently indicates our opinion that there is no law for the government of the citizens, the armies or the navy of the United States, within American jurisdiction, which is not contained in or derived from the Constitution. And whenever our Army or Navy may go beyond our territorial limits, neither can go beyond the authority of the President or the legislation of Congress. There are

under the Constitution three kinds of military jurisdiction: One to be exercised both in peace and war; another to be exercised in time of foreign war within the boundaries of the United States, or in time of rebellion and civil war within States or districts occupied by rebels treated as belligerents; and a third to be exercised in time of invasion or insurrection within the limits of the United States, or during rebellion within the limits of States maintaining adhesion to the National Government when the public danger requires its exercise. The first of these may be called jurisdiction under military law, and is found in acts of Congress prescribing rules and articles of war, or otherwise providing for the government of the national forces; the second may be distinguished as military government, superseding, as far as may be deemed expedient the local law, and exercised by the military commander under the direction of the President, with the express or implied sanction of Congress; while the third may be denominated martial law proper, and is called into action by Congress, or temporarily, when the action of Congress can not be invited, and in the case of justifying or excusing peril, by the President, in times of insurrection or invasion, or of civil or of foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights. We think that the power of Congress, in such times and in such localities, to authorize trials for crimes against the security and safety of the national forces, may be derived from its constitutional authority to raise and support armies and to declare war, if not from its constitutional authority to provide for governing the national forces.

Ex parte Milligan, 4 Wallace, 141.
Ex parte Vallandigham, 5 West. L. Month., 37; 28 Fed. Cas., No. 16816.

The persons charged with the assassination of the President in the city of Washington, on April 14, 1865, were lawfully tried before a military tribunal.

Military Commissions, 11 Op. Atty. Gen., 297.

The powers given by this clause may be exercised when the necessity for their exercise is called out by domestic insurrection and internal civil war.

Tyler *v.* Defrees, 11 Wall., 345;
Miller *v.* U. S., 11 Wallace, 292.

The general question whether the rules and doctrines of international law were at all applicable to the Civil War, or were questions arising out of it to be wholly determined by the municipal law, first came before the Supreme Court of the United States in the case of The Brig Amy Warwick (2 Black, (U. S.), 635). It has since been frequently before that tribunal;

See The Venice, 2 Wallace, 258;
Mrs. Alexander Cotton, 2 Wallace, 404;
The Hampton, 5 Wallace, 372;
The William Bagaley, 5 Wallace, 377;
Ouachita Cotton, 6 Wallace, 521;
Hanger *v.* Abbott, 6 Wallace, 532;
Cappell *v.* Hall, 7 Wallace, 542;
McKee *v.* U. S., 8 Wallace, 163;
The Grapeshot, 9 Wallace, 129.

"These cases all apply or declare to be applicable to the Rebellion, the general doctrines of public law which govern in wars between independent nations. Of course, the authority of Congress to modify these doctrines as applied to States in insurrection and the inhabitants thereof would not, probably, be disputed. In determining questions arising out of the Rebellion, the courts of the United States will first inquire what legislation has the Congress of the United States enacted respecting such questions. If any, the courts will be governed by it so far as it is within the constitutional competency of Congress. If none, then the general rules and doctrines of international law will be resorted to by the courts to determine the rights of the parties. What exceptions to the application of these rules and doctrines arising out of the peculiar nature of our Government and of the war, must necessarily or should properly be made, can not well be determined in advance." (Phillips *v.* Hatch, 1 Dill (U. S.), 571; 19 Fed. Cas. No. 11094.)

A declaration of war by competent authority puts an end to all rights of action as between the citizens of the respective belligerent powers, from its date to the conclusion of peace; suspends the running of the statute of limitations, and also the running of interest upon debts between citizens of the respective belligerents.

Jackson Ins. Co. *v.* Stewart, 1 Hughes (U. S.), 310; 13 Fed. Cas., No. 7152.

The act of Congress of June 11, 1864, enacting that whenever "after such action—civil or criminal—shall have accrued, such person can not, by reason of such resistance of the laws, or such interruption of judicial proceedings, be arrested or served with process for the commencement of the action, the time during which such person shall so be beyond the reach of legal process shall not be deemed or taken as any part of the time limited by law for the commencement of such action," was held constitutional as necessarily implied from the powers to make war and suppress insurrections.

Stewart *v.* Kahn, 11 Wallace, 504; Mayfield *v.* Richards, 115 U. S., 137.

A State statute providing that "there shall be levied and collected a capitation tax of $1 upon every person leaving the State by any railroad, stage coach, or other vehicle engaged in the business of transporting passengers for hire," and that the proprietors, owners, and corporations so engaged should pay the said tax of $1 for each and every person so conveyed or transported from the State, was held to be invalid.

Crandall *v.* Nevada, 6 Wallace, 44.

Wherein the court said:

The Federal power has a right to declare and prosecute wars, and as a necessary incident, to raise and transport troops through and over the territory of any State of the Union. If this right is dependent in any sense, however, limited upon the pleasure of a State, the Government itself may be overthrown by an obstruction to its exercise. Much the largest part of the transportation of troops during the late rebellion was by railroads, and largely through States whose people were hostile to the Union. If the tax levied by Nevada upon railroad passengers had been the law of Tennessee, enlarged to meet the wishes of her people, the Treasury of the United States could not have paid the tax necessary to enable its armies to pass through her territory.

CLAUSE 12.

To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years. (See Story on the Constitution, sec. 1188.)

The execution of this power "to raise and support armies," as well as that "to make rules for the government and regulation of the land and naval forces," falls within the line of the duties of Congress, and the control of Congress over the subject is plenary and exclusive. It can determine, without question from any State authority, how the armies shall be raised, whether by voluntary enlistment or forced draft, the age at which the soldier shall be received, and the period for which he shall be taken, and the compensation he shall be allowed, and the service to which he shall be assigned.

Tarbles' Case, 13 Wallace, 408.

The power of Congress to raise and support armies, to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions, and to provide for organizing,

arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States is clear and indisputable. The language used in the Constitution in making this grant of power is so plain, precise, and comprehensive as to leave no room for doubt or controversy as to where the supreme control over the military force of the country resides. This power of commanding the service of the militia in times of insurrection and invasion is a natural incident to the duties of superintending the common defense, and of watching over the internal peace of the country, and was wisely vested in Congress by the framers of the Constitution.

In re Gruier, 16 Wis., 431.

Full power of legislation in the matter of increase and reduction of the Army is with Congress, and Congress may ratify the action of the President in mustering officers out of the service, and validates the act although it may not have had full prior legal authority.

Street *v.* U. S., 133 U. S., 307.

The act of July 15, 1870, provided for a reduction of the Army to a force of 30,000 men. So far as enlisted men were concerned, the method of reduction was left entirely to the discretion of the President. So far as commissioned officers were concerned, four methods were prescribed. The first was voluntary resignation, accompanied by the inducements of an honorable discharge and one year's pay and allowances. The second was by placing officers upon the retired list, and for that purpose the limited number of the retired list was extended to 300. The third was by sending officers reported as "unfit for the proper discharge of their duties" (but who were not entitled to be placed upon the retired list because their inability was not incurred "in the line of their duty") before a military board, upon whose unfavorable report they were to be mustered out. The fourth was by the muster out of all officers who remained supernumerary on the 1st day of January, 1871. The statute was neither in conflict nor *in pari materia* with the act of July 17, 1866, providing that in time of war the President may dismiss an officer from the service at any moment and for any cause, that in time of peace he may dismiss him for cause, with the cooperation of a court-martial, or remove him without cause with the consent of the Senate, but was an exercise of the power "to raise and support armies."

Street *v.* U. S., 24 Ct. Cl., 230.

Who shall compose these armies, and how they shall be raised, must be determined by law, i. e., by Congress.

The act of Congress entitled "An act for enrolling and calling out the national forces, and for other purposes," of March 3, 1863, known as the "conscription act," was held to be valid.

Kneedler *v.* Lane, 45 Pa. St., 238.

When the inhabitants of a country who are liable to be called into military service have been enrolled, and such of them as are to render the service have been ascertained by draft, and the persons thus drafted have been lawfully required to attend at an appointed time and place of muster, those who disobey are amenable to military discipline and military organization, unless the subject has been otherwise legislatively regulated. Where the Government whose

authority they have set at naught may, by military force, compel their subjection to such discipline and organization, the system is conscription. But where, though their offense is cognizable by a military tribunal, their disobedience is punishable only by a certain pecuniary or other penalty, and they can not be further subjected to military discipline or detention, the system is not a conscription, as the word is now ordinarily understood.

McCall's Case, 5 Phila. (Pa.), 259; 15 Fed. Cas., No. 8669.

And under the twofold power to raise armies and to call forth and organize the militia of the several States, both regular national armies and occasional militia forces from the several States, may be raised, either by conscription or in other modes. The power to raise them by conscription may, at a crisis of extreme exigency, be indispensable to national security. Idem.

The Confederate conscript act was held to be valid under a similar provision in the Confederate States constitution.

Ex parte Coupland, 26 Tex., 386.
Ex parte Hill, 38 Ala., 429.

It is in the power of Congress to declare who may be enlisted, and the regulations established by the laws of Congress upon the subject are controlling authority.

Riellys' Case, 2 Abb., Pr. N. S. (N. Y.), 334.

Minors may be enlisted without the consent of their parents or guardians when the law fails to require such consent.

Ex parte Brown, 5 Cranch C. C., 554.
U. S. *v.* Bainbridge, 1 Mason, 71.

Congress has power to enlist minors in the Army without the consent of their parents.

U. S. *v.* Bainbridge (supra), 24 Fed. Cas., No. 14497.
U. S. *v.* Blakeney, 3 Gratt. (Va.), 387.

And the same rule applies to enlistments in the Navy.

U. S. *v.* Stewart, Crabbe, 265; 27 Fed. Cas., No. 16, 400.
Com. *v.* Murray, 4 Binn. (Pa.), 487.
Com. *v.* Gamble, 11 S. & R. (Pa.), 93.

The last two cases cited refer to enlistments in the Marine Corps.

Congress has power to make and authorize such orders and regulations as may be necessary to prevent those who are liable by law to military service, from evading that duty; and an order to prevent them from leaving the country and State, to avoid an impending draft, would be necessary for that purpose.

Allen *v.* Colby, 47 N. H., 547.

Enlistment is not a voidable contract. It changes the status of the person enlisting, and a minor is not entitled to his discharge because he has falsely represented himself to be of full age.

In re Morisey, 137 U. S., 157.
In re Grimley, 137 U. S., 147.

All persons, capable of performing military duty, irrespective of age or of previous exemptions, may be compelled to do so under laws for the purpose; and it was so held in the Confederate States where the question would be the same.

Ex parte Coupland, 26 Tex., 386.
Barber *v.* Irwin, 34 Ga., 27.
Ex parte Tate, 39 Ala., 254.
See also Kneedler *v.* Lane, 45 Pa. Stat., 238.

CLAUSE 13.

To provide and maintain a navy.

The rules respecting armies apply equally to the Navy. The powers of enlistment and conscription are the same, but conscription must operate under prescribed and impartial rules. No impressment of seamen is allowed as was formerly practiced in England. (See Cooley's Constitutional Limitations, 6th ed., p. 363.)

Legislative authority in Congress may, in some instances, be derived from more than one grant in the Constitution, as a river may receive its waters through streams flowing from different sources. Thus the authority to build and equip vessels of war is, doubtless, implied in the power to "declare war," but the same authority is more directly conferred by the power to "provide and maintain a navy."

U. S. *v.* Burlington, etc., Ferry Co., 21 Fed. Rep., 340.

This clause authorizes the Government to buy or build any number of steam or other ships of war, to man, arm, and otherwise prepare them for war, and to dispatch them to any accessible part of the globe.

U. S. *v.* Rhodes, 1 Abb. (U. S.), 28, 27 Fed. Cas., No. 16151.

Under this power the Naval Academy has been established.

CLAUSE 14.

To make rules for the government and regulation of the land and naval forces.

These rules must not be inconsistent with the proper authority of the President as Commander in Chief of the Army and Navy, which, being conferred by the Constitution, can not be taken away by Congress.

Art. II, sec. 2. See Swain *v.* U. S., 28 Ct. Cl., 173.

The execution of this power falls within the line of the duties of Congress, and its control over the subject is plenary and exclusive. It can provide the rules for the government and regulation of the forces after they are raised, define what shall constitute military offenses, and prescribe their punishment. No interference with the execution of this power of the National Government in the formation, organization, and government of its armies by any State officials would be permitted without greatly impairing the efficiency of, if it did not utterly destroy, this branch of the public service.

Tarbles' Case, 13 Wallace, 408.

A State can not in any particular, either through its legislative or judicial department, regulate or circumscribe the powers of the United States in respect to a matter the control of which is vested solely in the general Government. The wisdom, expediency, or justness of the military laws, rules, and regulations adopted and prescribed by the United States are no concern of the State. The proper enforcement

of such laws, rules, and regulations can not be measured and determined by State laws.

In re Fair, 100 Fed. Rep., 157.

Rules promulgated by the President without legislative authority are without legal validity and in derogation of the powers of Congress.

The constitutional power of the President to command the Army and Navy, and of Congress "to make rules for the government and regulation of the land and naval forces," are distinct; the President can not by military orders evade the legislative regulations; Congress can not by rules and regulations impair the authority of the President as Commander in Chief.

Swain *v.* U. S., 28 Ct. Cl., 173.

The powers conferred upon Congress "to provide and maintain a navy," "to make rules for the government of the land and naval forces"; the clause which requires a presentment of a grand jury in cases of capital or otherwise infamous crimes, expressly excepting from its operation "cases arising in the land and naval forces"; and the section declaring that "the President shall be Commander in Chief of the Army and Navy of the United States and of the militia of the several States when called into the actual service of the United States," shows that Congress has the power to provide for the trial and punishment of military and naval offenses in the manner then and now practiced by civilized nations; and that the power to do so is given without any connection between it and the article of the Constitution defining the judicial power of the United States. The two powers are shown to be entirely independent of each other.

Dynus *v.* Hoover, 20 Howard, 78.

Congress has power to confer jurisdiction upon military and naval authorities to try by court-martial military and naval offenses, and this jurisdiction may be exercised both in peace and war.

In re Bogart, 2 Sawy. U. S., 396; 3 Fed. Cas., No. 1596.
U. S. *v.* McKenzie, 1 N. Y. Leg. Obs., 371; 30 Fed. Cas., No. 18313.

Congress may enact a statute for the punishment of an offense committed by a marine on board a ship of war wherever that ship may lie.

U. S. *v.* Bevans, 3 Wheaton, 390.

In a time of war, when portions of hostile territory are in the military occupation of Federal forces, the President as Commander in Chief may appoint provisional courts for the determination of controversies within such territory and for the administration of justice.

Jacker *v.* Montgomery, 13 Howard, 498.
The Grapeshot, 9 Wall., 129.
Edwards *v.* Tanneret, 12 Wall., 446.

But such courts, established on foreign soil, are mere agents of the military power to assist in preserving order and protecting the inhabitants in their persons and property. They can not adjudicate upon questions of prize or decide upon the rights of the United States or of individuals.

Jecker *v.* Montgomery, 13 Howard, 498.

It is competent for Congress, by the rules and articles of war, to provide for the ordering of courts-martial for the trial of offenses arising in the military and naval service.

Re Bogart, 2 Sawyer, 396.

These courts, except as may be otherwise provided, will execute their duties and regulate their mode of proceeding by the customary military law.

Martin *v.* Watt, 12 Wheat., 19.

But a person not enrolled or liable to be enrolled for service can not be subjected to the jurisdiction of such courts.

Wise *v.* Withers, 3 Cranch, 331.

Nor can the courts proceed against those who are liable without giving notice and an opportunity of defense to the accused.

Meade *v.* Deputy Marshal, 2 Car. Law Rep., 320.

Where a court-martial proceeds without authority and restrains a person of his liberty or inflicts punishment, all the parties responsible for the action are liable to suits therefor in the common law courts.

Milligan *v.* Hovey, 3 Biss., 13.
Martyn *v.* Fabrigas, Cowp., 161.

The jurisdiction of such courts may always be inquired into by civil courts and a person held under their rules discharged if jurisdiction is wanting.

In re Grimley, 137 U. S., 147.

Offenses against martial law and the laws of war and all acts not justified by the laws of war which are calculated to impede or obstruct the operations of the military authorities or to render abortive any attempt by the Government to enforce its authority may be punished by military courts or commissions organized by the President as Commander in Chief or by the immediate military commander or established under the authority of Congress. But these tribunals can not try offenses against the general laws when the courts of the land are in the performance of their regular functions and no impediment exists to a lawful prosecution there.

Ex parte Milligan, 4 Wall., 2.

An impediment does exist, however, when martial law is lawfully declared.

Luther *v.* Borden, 7 How., 1.

And this creates an exception to the general rule that the military in times of peace must be in strict subordination to the civil power, and in times of war also, except on the theater of warlike movements.

1 Bl. Com., 413–415.

The military tribunals may also take cognizance of offenses alleged to have been committed by soldiers upon citizens within the field of military operations against an armed rebellion while the civil law is for the time suspended, and to the exclusion of the ordinary jurisdiction when restored.

Coleman *v.* Tenn., 97 U. S., 509.

The fifth article of amendment to the Constitution, which declares that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury," expressly excepts "cases arising in the land or naval forces," and leaves such cases subject to the rules for the government and regulation of those forces which, by the eighth section of the first article of the Constitution, Congress is empowered to make.

Kurtz *v.* Moffitt, 115 U. S., 500.

The question who shall act on courts-martial for the trial of offenders belonging to the various branches of the Army of the United States is one entirely for Congress to determine.

McClaughry *v.* Deming, 186 U. S., 69.

The provision that "the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish," has no application to the abnormal condition of conquered territory in the occupancy of the conquering army. It refers only to courts of the United States, which military courts are not.

Mechanics', etc., Bank *v.* Union Bank, 22 Wallace, 295.

In this case the court said that the power to establish by military authority courts for the administration of civil as well as criminal justice in portions of the insurgent States, occupied by the national forces, is precisely the same as that which exists when foreign territory has been conquered and is occupied by the conquerors.

Affirming 25 La. Am., 387; see also Burke *v.* Tregre, 22 La. Am., 629.

A writ of certiorari can not be issued by the Supreme Court of the United States to review the proceedings of a military commission. It is not in law or equity within the meaning of those terms as used in the Constitution, nor is a military commission a court within the meaning of the judiciary act of 1789.

The appellate powers of the Supreme Court, as granted by the Constitution, are limited and regulated by the acts of Congress and must be exercised subject to the exceptions and regulations made by Congress.

Ex parte Vallandigham, 1 Wallace, 251.

CLAUSE 15.

To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions.

The militia consists of those persons who under the law are liable to perform military duty, and who are enrolled and officered so as to be ready for service when called upon. (Cooley.)

They are State forces until actually called into the service of the Union.

It is within the authority of Congress under this clause to provide "that whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe, it shall be lawful for the President of the United States to call forth such number of the militia of the State or States most convenient to the place of danger, or scene of action, as he may judge necessary to repel such

invasion, and to issue his order for that purpose to such officer or officers of the militia as he shall think proper," and under such a statute the authority to decide whether the exigency has arisen belongs exclusively to the President, and his decision is conclusive upon all other persons.

Martin *v.* Mott, 12 Wheaton, 29.
Luther *v.* Borden, 7 Howard, 45.

The President may make his requisition directly upon the executive of the State, or upon the militia officers. Cases cited supra; also Houston *v.* Moore (5 Wheaton, 1).

The power to provide for repelling invasions includes the power to provide against the attempt and danger of invasion as the necessary and proper means to effectuate the object.

Martin *v.* Mott, 12 Wheaton, 29.

Under these decisions (Martin *v.* Mott and Luther *v.* Borden), it would appear that "invasions" are not restricted to violations of territory, but might logically and essentially include violations of the right to proper activities on the part of the Government and of its citizens on the high seas in any part of the world.

The power of Congress to suppress insurrection is not limited to victories in the field and the dispersion of insurgent forces. It carries with it inherently rightful authority to guard against an immediate renewal of the conflict, and to remedy the evils growing out of its rise and progress.

Raymond *v.* Thomas, 91 U. S., 714.
Stewart *v.* Kahn, 11 Wallace, 506.

In the power to provide for calling forth the militia is necessarily included the power of inflicting a penalty on delinquents by the judgment of some court of the United States, and of carrying the judgment into effect by an execution. It is not an infringement of the rights of citizens of a State to proceed to the trial of delinquent militiamen by courts-martial.

Duffield *v.* Smith, 3 S. and R. (Pa.), 593.

The militia, as citizens, are peculiarly under the protection of the State sovereignty. They compose the only State force, and the genius of our Government forbids that they should be subjected to the military tribunals of the Federal Government, unless it be during those extraordinary occasions defined in the Constitution of the United States, when the public safety and the high behests of war demand the sacrifice.

Mills *v.* Martin, 19 Johns (N. Y.), 24.

A State statute providing that the officers and privates of the militia of that State, neglecting or refusing to serve when called into actual service, in pursuance of any order or requisition of the President of the United States, should be liable to the penalties defined in certain acts of Congress, and also providing for the trial of such delinquents by a State court-martial, was held not to be repugnant to the Constitution and laws of the United States.

Houston *v.* Moore, 5 Wheaton, 1.

CLAUSE 16.

To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States, respectively, the appointment of the officers and the authority of training the militia according to the discipline prescribed by Congress.

Though the States have the appointment of the officers, the bodies of the militia called into the service of the United States and subject not only to the orders of the President as Commander in Chief, but also to those of any officer outranking their own, who may, under the authority of the Commander in Chief, be placed over them.

An army obtained by conscription is not the militia, though conscripted from it.

See the discussion in Kneedler *v.* Lane (45 Pa. St., 238).

Congress has power to provide for organizing, arming, and disciplining the militia, and this power being unlimited, except in the two particulars of officering and training them, according to the discipline to be prescribed by Congress, it may be exercised to any extent that may be deemed necessary by Congress.

Houston *v.* Moore, 5 Wheaton, 16.
Matter of Spangler, 11 Mich., 305.

The power of the State governments to legislate on the same subjects having existed prior to the formation of the Constitution, and not having been prohibited by that instrument, it remains with the States, subordinate nevertheless to the paramount law of the General Government operating upon the same subject. But after a detachment of the militia has been called forth and has entered into the service of the United States, the authority of the General Government over such detachment is exclusive.

Houston *v.* Moore, 5 Wheaton, 16.

The power conferred upon Congress by this clause does not exclude State legislation upon the same subject unless the power conferred on Congress is actually exercised.

People *v.* Hill, 126 N. Y., 503.

In this case the court said:

The power to control and organize the militia resided in the several States at the time of the adoption of the Constitution of the United States and was not taken away by that instrument. The power of legislation over the subject after its adoption was concurrent in the States and in Congress, and the power of State legislation remained until Congress in the exercise of the power conferred upon it by the Constitution had legislated. State legislation in relation to the militia is only excluded when repugnant to or inconsistent with Federal legislation enacted within the purview of the power conferred by the Federal Constitution and there is authority for regarding the State legislation as inconsistent which undertakes to supplement laws passed by Congress covering the subject of the power by annexing new qualifications or incidents not prescribed by the Federal law.

The clause reserving "to the States, respectively, the appointment of the officers" and the authority of framing the militia according to the discipline prescribed by Congress does not put any restriction upon the States in respect to the concurrent legislation concerning the militia.

Dunne *v.* Reapee, 94 Ill., 130.

Quoting with approval from the opinion of Story, J., in Houston *v.* Moore (5 Wheaton, 51):

That reservation constitutes an exception merely from the power given to Congress "to provide for organizing, arming, and disciplining the militia," and is a limitation upon the authority which would otherwise have devolved upon it as to the appointment of officers.

The power to determine who shall compose the militia is exclusive in Congress, as a power, when vested in the General Government, is not only exclusive when it is so declared in terms, or when the State is prohibited from the exercise of the like power, but also when the exercise of the same power by the State is superseded and necessarily impracticable and impossible after its exercise by the General Government. Congress has provided for the national defense by establishing a uniform militia throughout the United States.

In Opinion of Justices (14 Gray (Mass.), 619) the court said:

We do not intend, by the foregoing opinion, to exclude the existence of a power in the State to provide by law for arming and equipping other bodies of men, for special service of keeping guard and making defense, under special exigencies, or otherwise in any case not coming within the prohibition of that clause in the Constitution, Article I, section 10, which withholds from the State the power to keep troops; but such bodies, however armed or organized, could not be deemed any part of the "militia" as contemplated and understood in the Constitution and laws of Massachusetts and of the United States, and as we understand in the question propounded for our consideration.

See also Tyler *v.* Pomeroy, 8 Allen (Mass.), 493.

A State statute requiring aliens to do militia and patrol duty is not against the Constitution of the United States.

Ansley *v.* Timmons, 3 McCord L. (S. Car.), 329.

The governor of a State has no power to depose an officer or interfere with the organization of the regiment, to which he belongs, after such regiment is accepted and mustered into the service of the United States. Giving to the constitutional reservations in favor of the States the most liberal construction which can be claimed for them, they confer no right on the State authorities to disturb the organization of militia or volunteer regiments in the national service or to interfere in any way with the control which the President under the National Constitution and laws shall exercise over them.

Case of Col. Weir, 10 Op. Atty. Gen., 279.

The intent of the foregoing provisions, Articles X to XVI, inclusive, is to render the Federal Government supreme in all that pertains to war, with subordinate authority in the States. To this end is a subsequent provision that "No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal." (Art. I, sec. 10, clause 1.)

By this clause and section 2 of Article II, "He [the President] shall have power, by and with the advice and consent of the Senate, to make treaties," the States have surrendered the treaty-making power to the General Government, and have vested it in the President and Senate, and, when duly exercised by the President and Senate, the treaty resulting is the supreme law of the land, to which not only State laws but State constitutions are in express terms subordinated.

In re Tiburcio Parrott, 1 Fed. Rep., 501.

No power under the Government can make "any treaty, alliance, or confederation," entered into by a State, valid, or dispense with the constitutional prohibition.

Rhode Island *v.* Mass., 12 Peters, 724.

By reason of this clause the confederation formed by Virginia and other States called the Confederate States of America, could not be recognized as having any legal existence.

Williams *v.* Bruffy, 96 U. S., 183.

To grant letters of marque and reprisal would lead directly to war, the power of declaring which is expressly given to Congress.

Barron *v.* Baltimore, 7 Peters, 249.

Still another provision to the same end is that "No State shall, without the consent of Congress * * * keep troops or ships of war in times of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay." (Art. I, sec. 10, clause 3.)

The agreements and compacts which may be entered into with the consent of Congress differ from the treaties, alliances, and confederations which are absolutely forbidden, in this: The latter are made for perpetuity or for a considerable time, and generally have successive execution, while the former are made for temporary purposes and are perfected in their execution once for all.

Holmes *v.* Jammison, 14 Peters, 540, 572.
Virginia *v.* Tennessee, 148 U. S., 521.
Wharton *v.* Wise, 153 U. S., 173.
Virginia *v.* W. Va., 11 Wallace, 59.
Green *v.* Biddle, 8 Wheaton, 85.
Louisiana *v.* Texas, 176 U. S., 17.

Active militia or National Guard, organized and enrolled under a State military code for discipline and not for military service, except in times of insurrection, invasion, and riots, the men comprising it coming from the body of the militia of the State, and, when not engaged at stated periods in drilling or training for military duty, returning to their usual vocations, subject to call when public exigencies require it, but not kept in service, like standing armies in times of peace, are not "troops" within the meaning of this clause.

Luther *v.* Borden, 7 Howard, 1.
State *v.* Wagener, 74 Minn., 522.

POWERS OF THE EXECUTIVE.

ARTICLE II, SECTION 2.

"The President shall be Commander in Chief of the Army and Navy of the United States, and of the militia of the several States, when called into the actual service of the United States."

"In the distribution of political power between the great departments of government, there is such a wide difference between the power conferred on the President of the United States and the authority and sovereignty which belong to the English Crown, that it would be altogether unsafe to reason from any supposed resemblance between them, either as regards conquest in war or any

other subject where the rights and powers of the executive arm of the Government are brought into question. Our own Constitution and form of government must be our only guide." (Fleming *v.* Page, 9 Howard, 618.)

Said Hamilton in the Federalist, No. LXIX:

> The President is to be the Commander in Chief of the Army and Navy of the United States. In this respect his authority would be nominally the same with that of the King of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the confederacy; while that of the British King extends to the declaring of war and to the raising and regulating of fleets and armies, all of which, by the Constitution under consideration, would appertain to the Legislature.

The power of the Executive to establish rules and regulations for the government of the Army is undoubted. The power to establish implies, necessarily, the power to modify or repeal, or create anew. The Secretary of War is the regular constitutional organ of the President for the administration of the Military Establishment of the Nation; and rules and orders publicly promulgated through him must be received as the acts of the Executive, and as such are binding upon all within the sphere of his legal and constitutional authority.

U. S. *v.* Eliason, 16 Peters, 302.
Kurtz *v.* Moffitt, 115 U. S., 503.

But this power is limited and does not extend to the making of provisions of a legislative nature.

Navy Regulations, 6 Op. Atty. Gen., 10.
Power of President to create a Militia Bureau in War Department, 10 Op. Atty. Gen., 14.

While the President is made Commander in Chief by the Constitution, Congress has the right to legislate for the Army, not impairing his efficiency as such Commander in Chief, and when a law is passed for the regulation of the Army, having that constitutional qualification, he becomes as to that law an executive officer, and is limited in the discharge of his duty by the statute.

McBlair *v.* U. S., 19 Ct. Cls., 541.

The constitutional power of the President, to command the Army and Navy, and that of Congress "to make rules for the government and regulation of the land and naval forces," are distinct; Congress can not by rules and regulations impair the authority of the President as Commander in Chief.

Swain *v.* U. S., 28 Ct. Cls., 173.

The power of command and control of the Army the framers of the Constitution placed in the hands of the President, with only two restrictions set upon it; that Congress should have power "to make rules for the government and regulation of the land and naval forces;" that the appointment of officers should be "by and with the advice and consent of the Senate."

Street *v.* U. S., 24 Ct. Cls., 247.

Whatever the President of the United States, as Commander in Chief, might do if personally present, may be done by the superior

officer in command of any district unless restrained by orders or by the peculiar nature of the service in which he is engaged.

Hefferman *v.* Porter, 6 Coldw. (Tenn.), 398.

The duty and power of the President are purely military. As Commander in Chief he is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy. He may invade the hostile country and subject it to the sovereignty and authority of the United States. But his conquests do not enlarge the boundaries of this Union no extend the operation of our institutions and laws beyond the limits before assigned to them by the legislative power.

Fleming *v.* Page, 9 Howard, 615.

"It is true that in the case in which these observations are made, the point to be determined was, whether enemies' territory which in the course of hostilities had come into our military possession, became a part of the United States, and subject to our general laws. But they are important to this case as defining the power of the President in war to be merely that of the military commander in chief; that territory can be acquired only by the treaty-making and legislative authority, and, consequently, that the fact that hostilities are by the military authority directed against a particular portion of the enemy's territory, can not be said to make the acquisition of that territory the object of the war." (U. S. *v.* Costillero, 2 Black (U. S.), 358.)

The right of the President temporarily to govern localities through his military officers he derives solely from the fact that he is Commander in Chief of the Army and is to see that the laws are executed; and he can exercise it to just the extent that, and no further than, by the laws of war a commanding general in the Army of the United States could do it. Where the laws are or may be executed without the interference of the President by his military authority he has no right thus to interfere.

Griffin *v.* Wilcox, 21 Ind., 382.

The right of the President as Commander in Chief of the Army and Navy of the United States under the Constitution to exercise government and control over Porto Rico did not cease or become defunct in consequence of the signature of the treaty of peace, nor from its ratification. It was settled by the judgment of the Supreme Court of the United States in a similar case, arising out of the enforcement of local tariff laws in California subsequently to the cession of that territory and prior to any legislation with reference to it by Congress, that the civil government organized from a right of conquest by the military officers of the United States was continued over the territory as a ceded conquest without any violation of the Constitution or laws of the United States.

Cross *v.* Harrison, 16 Howard, 164.

According to the well-settled principles of public law relating to territory held by conquest, and according to the adjudication of the Supreme Court in Cross *v.* Harrison (16 How., 164), the military authorities in possession, in the absence of legislation by Congress, may make such rules or regulations and impose such duties imposed upon merchandise imported into the conquered territory as they may in their judgment and discretion deem wise and prudent.

Porto Rico, Duties, 22 Op. Atty. Gen., 561.

The President had power to create military governments and to appoint provisional governors for States then lately in insurrection, but this did not of itself change the general laws then in force for the settlement of the estates of deceased persons, and did not remove from office those who were at the time charged by law with public duties in that behalf.

Ketchum *v.* Buckley, 99 U. S., 190.
Cross *v.* Harrison, 16 Howard, 189.
Scott *v.* Billgerry, 40 Miss., 133.

The establishment of a provisional court by a presidential proclamation, upon the suppression of the rebellion, with authority, among other powers, to hear, try and determine all causes in admiralty, was an excise of the constitutional authority of the President, and Congress had power, upon the close of the war and the dissolution of the provisional court, to provide for the transfer of causes pending in that court and of its judgments and decrees to the proper courts of the United States.

The Grapeshot, 9 Wallace, 131.
Lewis *v.* Cocks, 23 Wallace, 469.
Dooley *v.* U. S., 182 U. S., 234.
Jecker *v.* Montgomery, 13 Howard, 498.
See also Mechanics, etc., Bank *v.* Union Bank, 22 Wallace, 296, affirming 25 La. Am., 387.
See also Burke *v.* Tregre, 22 La. Am., 629.

Upon the conqest of New Mexico in 1846, the commanding officer of the conquering army, in virtue of the power of conquest occupancy and with the sanction and authority of the President, ordained a provisional government for the country. The ordinance created courts with both civil and criminal jurisdiction. It did not undertake to change the municipal laws of the territory, but it established a judicial system with a superior or appellate court, and with circuit courts, the jurisdiction of which was declared to embrace, first, all criminal causes that should not be otherwise provided for by law, and, secondly, original and exclusive cognizance of all civil cases not cognizable before the prefects and alcaldes. But though these courts and this judicial system were established by the military authority of the United States, without any legislation of Congress, they were lawfully established.

Leitensdoofer *v.* Webb, 20 Howard, 176.

It is within the power of the President of the United States, as Commander in Chief, to validly convene a general court-martial even where the commander of the accused officer to be tried is not the accuser.

Swain *v.* U. S., 165 U. S., 558.
Runkee *v.* U. S., 19 Ct. Cl., 409.
See also approval of Court-Martial Sentence, 15 Op. Atty. Gen., 302.

Martial rule can never exist when the courts are open, and in the proper and unobstructed exercise of their jurisdiction.

Ex parte Milligan, 4 Wallace, 127.
Lamar *v.* Dana, 18 Int. Rev. Rec., 163; 14 Fed. Cas., No. 8006.
In re Kemp, 16 Wis., 376.
But see Suspension of Writ of Privilege of Habeas Corpus, 10 Op. Atty. Gen., 74.

The President has no power to initiate or declare a war against either a foreign nation or a domestic State. But by the acts of

Congress of February 28, 1795, and March 3, 1907, he was authorized to call out the militia and use the military and naval forces of the United States in case of invasion by foreign nations, and to suppress insurrection against the government of a State or of the United States. If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be "immaterial."

The Brig Army Warwick, 2 Black (U. S.), 668.

The right of the President to institute a blockade of ports in possession of the States in rebellion, which neutrals were bound to regard, was affirmed in The Brig Army Warwick (2 Black (U. S.), 671).

Whether the President, in fulfilling his duties as Commander in Chief in suppressing an insurrection, has met with such armed hostile resistance and a civil war of such alarming proportions as will compel him to accord to those engaged therein the character of belligerents, is a question to be decided by him, and the courts must be governed by the decisions and acts of the political department of the Government to which the power was intrusted.

The Brig Army Warwick (2 Black (U. S.), 670).

Even if, in the absence of congressional action, the power of permitting partial intercourse with a public enemy may not be exercised by the President alone, who is constitutionally invested with the entire charge of hostile operations, there is no doubt that a concurrence of both affords ample foundation for any regulations on the subject.

Hamilton *v.* Dillin, 21 Wallace, 87.

The President was authorized during the Civil War, as Commander in Chief of the Armies of the United States, to employ secret agents to enter the rebel lines and obtain information respecting the strength, resources, and movements of the enemy, and contracts to compensate such agents are so far binding upon the Government as to render it lawful for the President to direct payment of the amount stipulated out of the contingent fund under his control.

Totten *v.* U. S., 92 U. S., 106, affirming 9 Ct. Cl., 506.

The President is made Commander in Chief of the Army and Navy of the United States at all times, and Commander in Chief of the militia only when called into the actual service of the United States.

Johnson *v.* Sayre, 158 U. S., 115.

The right of the President to command armies and direct the minutest movement of the soldier is very different from the exercise of the power of appointment of a person, by which the higher function of war is performed, through the instrumentality of officers of the Army. The power of appointment in the military service is not incident to the President as an exclusive power of his office, but is subject to the advice and consent of the Senate, so that in its exercise there is called into requisition other volition than the mere will of the President.

McBlair *v.* U. S., 19 Ct. Cl., 537.

The President, as Commander in Chief, and any commanding officer exercising his powers, may lawfully require any officer of the United States to perform the appropriate duties of his station in the militia when in the service of the United States whenever the public interest shall so require. If it were otherwise it would be in the power of the States by omitting to appoint the proper officers to defeat the whole object of the constitutional provision empowering Congress "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions; to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States, respectively, the appointment of the officers and the authority of training the militia according to the discipline prescribed by Congress.

Disbursements by Quartermasters to Militia, 2 Op. Atty. Gen., 711.

The admission of merchandise into the ports of the United States from conquered territory is governed solely by existing laws passed by Congress, and the President has no power to add to or detract from the force and effect of such laws.

Porto Rico, Duties, 22 Op. Atty. Gen., 560.

The President must at all times be governed by law, and his orders which the law does not warrant will be no protection to officers acting under them.

Little *v.* Barreme, 2 Cranch, 170.

An example is where he appoints an unlawful military commission, which proceeds to try and punish offenders against the law.

Milligan *v.* Hovey, 3 Biss., 13.

The word "department" clearly means the same thing as in the clause giving Congress the power to vest the appointment of inferior officers in the heads of departments. The "principal officer" in this clause is the equivalent to the "head of department" in the other.

U. S. *v.* Germaine, 99 U. S., 511.

TRIAL BY JURY.

"The trial of all crimes, except in cases of impeachment, shall be by jury." (Art. III, sec. 2.)

This provision was infringed by the trial of a citizen, in a State which upheld the authority of the Government and where the courts were open and their process unobstructed, by a military commission, a court not ordained and established by Congress.

Ex parte Milligan, 4 Wallace, 115.

INDICTMENT BY GRAND JURY.

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger." (Amendment, Art. V.)

This amendment, instead of limiting the jurisdiction of courts-martial, leaves it to be exercised to the fullest extent, under such

"rules for the government and regulation of the land and naval forces" as Congress might, under the power given to it by the Constitution, see fit to prescribe.

Runkee *v.* U. S., 19 Ct. Cls., 411.
Ex parte Reed, 100 U. S., 21.
Kurtz *v.* Moffitt, 115 U. S., 500.

Section 12 of the act of March 3, 1873, providing "that all prisoners under confinement in said military prisons undergoing sentences of court-martial shall be liable to trial and punishment by courts-martial under the rules and articles of war for offenses committed during said confinement," is constitutional, as applied to one under confinement in a military prison, who at the time of the sentence was also sentenced to be dishonorably discharged from the military service. The discharge was no doubt operative to deprive him of pay and allowances, but so long as he was held in custody under sentence of a court-martial for the purpose of enforcing discipline and punishing him for desertion he remained subject to military law, which prevailed in the prison where he was confined, and subject also to the jurisdiction of a court-martial for all violations of such law committed while he was thus confined.

In re Craig, 70 Fed. Rep., 969.

An offense committed while in actual service, though an arrest and commencement of the prosecution are not made before the connection of the offender with the service is legally severed by the expiration of his term of service or by resignation, dismissal, or other discharge, is a "case arising in the naval forces," and Congress has power to authorize a trial after the connection is so severed and after the accused has become a private citizen.

In re Bogart, 2 Sawyer (U. S.), 396; 3 Fed. Cas., No. 1596.

The words "when in actual service in time of war or public danger" apply to the militia only. All persons in the military or naval service of the United States are subject to the military law—the members of the Regular Army and Navy at all times, the militia so long as they are in such service.

Johnson *v.* Sayre, 158 U. S., 114.
Ex parte Mason, 105 U. S., 700.
In re Bogart, 2 Sawyer (U. S.), 396; 3 Fed. Cas., No. 1596.
U. S. *v.* McKenzie, 1 N. Y. Leg. Obs., 371; 30 Fed. Cas., No. 18313.

QUARTERING SOLDIERS.

"No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war but in a manner to be prescribed by law." (Amendments, Art. III.)

The evil at which this is aimed has been so long unpracticed in this country that it is difficult to suggest to the mind the possibility that security against it may be necessary in a country governed by settled principles of law. Nevertheless, a declaration of the indefeasible right of the citizen can never be wholly needless.

Soldiers will be quartered upon the people, if at all, under the orders of a superior, and either because of some imperious necessity, or in order to annoy and injure those who are compelled to receive them The plea will always be that of necessity; but this can never be a

truthful plea in time of peace, and if the necessity is likely to arise in time of war, the first principles of justice demand that it should be provided for by law, and limitations and restraints imposed. At best it is an arbitrary proceeding; it breaks up the quiet of the home; it appropriates the property of the citizen to the public use without previous compensation, and without assurance of compensation in the future, unless the law shall have promised it. It is difficult to imagine a more terrible means of oppression than would be the power in the executive, or in a military commander, to fill the house of an obnoxious person with a company of soldiers, who shall be fed and warmed at his expense, under the direction of an officer accustomed to the exercise of discretionary authority within the limits of his command, and in whose presence the ordinary laws of courtesy, not less than the rules of law which protect person and property, may be made to bend to whim or caprice. Such expressions were fresh in the minds of the people when the Declaration of Independence was made, and they then denounced what they prohibited by this amendment. It is proper to add that this protection has no application in time of war to the enemies of the country.

Cooley, Constitutional Limitations, 6th ed., 373.

TREASON.

"Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court. The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood or forfeiture except during the life of the person attainted." (Art. III, sec. 3.)

No other acts than those defined in the Constitution can be declared to constitute the offense. Congress can neither extend, nor restrict, nor define the crime. Its power over the subject is limited to prescribing the punishment.

U. S. *v.* Greenhouse, 4 Sawyer (U. S.), 457; 26 Fed. Cas., No. 15254.
U. S. *v.* Hoxie, 1 Paine (U. S.), 265; 26 Fed. Cas., No. 15407.

Congress can only prescribe the punishment for treason, regulate the trial, and direct the mode in which that punishment is to be executed.

U. S. *v.* Fries, 3 Dall. (U. S.), 515; 9 Fed. Cas., No. 5126.

Madison, in the Federalist, No. XLII, said:

As treason may be committed against the United States, the authority of the United States ought to be enabled to punish it. But as new-fangled and artificial treasons have been the great engines by which violent factions, the natural offspring of freer government, have usually wreaked their alternate malignity on each other, the Convention have, with great judgment, opposed a barrier to this peculiar danger by inserting a constitutional definition of the crime, fixing the proof necessary for conviction of it, and restraining the Congress, even in punishing it, from extending the consequences of guilt beyond the person of its author.

The two species of treason mentioned in the Constitution are described in it in language borrowed from that of the English statute of treasons.

The phrase "levying war" is understood and applied in the United States in the sense in which it had been used in England.

U. S. *v.* Greiner, 4 Phila., 396; 26 Fed. Cas., No. 15262.
See also U. S. *v.* Burr, 25 Fed. Cas., No. 14693.

The provision of the Constitution defining in what treason shall consist was taken from the statute of 25 Edward III, of England, which had been several times reaffirmed, for the purpose of correcting abuses that had grown up in that kingdom in respect to the law, both by acts of Parliament and decisions of the courts under the tyrannical reigns of the Tudors and the Stuarts. Those abuses were well known to the founders of our Government, and doubtless led to the peculiar phraseology observable in the definition of the crime, namely, that it shall consist only in levying war against the United States, or in adhering to their enemies, giving them aid and comfort, and to the other equally stringent feature, that no person shall be convicted of the offense except on the testimony of two witnesses to the same overt act. The first prohibits Congress from making any other acts of the citizen than those specified, treason; and the second prevents the introduction of constructive treasons, which had been engrafted upon this statute of Edward III by judicial decisions.

Law of Treason, 5 Blatchf. (U. S.), 549; 30 Fed. Cas. No. 18271.
Druecker *v.* Salomon, 21 Wis., 626.

For instances of forced and arbitrary constructions to raise offenses into the crime and punishment of treason, which never had been suspected to be such, see Blackstone, Fourth Book, 75, and Trial of Algernon Sidney, 9 State Trials, 817.

There must be an actual assembly for the purpose of effecting a treasonable purpose, to constitute a levying of war.

Ex parte Bollman, 4 Cranch, 126.
U. S. *v.* Greathouse, 4 Sawy. (U. S.), 457.

To constitute an actual levy of war there must be an assembly of persons, met for the treasonable purpose, and some overt act done, or some attempt made by them with force to execute or toward executing that purpose. There must be a present intention to proceed in the execution of the treasonable purpose by force. The assembly must now be in a condition to use force, and must intend to use it, if necessary, to further, or to aid, or to accomplish the treasonable design.

Law of Treason, 1 Story (U. S.), 614; 30 Fed. Cas., No. 18275.

If the purpose be entirely to overthrow the Government at any one place, by force, that is a treasonable purpose.

Charge of Grand Jury, 1 Sprague (U. S.), 602; 30 Fed. Cas., No. 18273.
Charge of Grand Jury, 2 Sprague (U. S.), 292; 30 Fed. Cas., No. 18274.

Although there must be forced used, it is not necessary that there be any military array or weapons.

Druecker *v.* Salomon, 21 Wis., 626.

Nor that any actual violence be committed, if a body of men are assembled for the purpose of making war against the Government, and are in a condition to make that war.

U. S. *v.* Burr, 25 Fed. Cas., No. 14693.

To instigate treason successfully is to commit it.

Charge to Grand Jury, 2 Wall., jr. (C. C.), 134; 30 Fed. Cas., No. 18276.

It is treason "in levying war against the United States" for persons who have known but a common interest with their fellow citizens,

to oppose or prevent, by force, numbers, or intimidation, a public and general law of the United States, with intent to prevent its operation or compel its repeal. Force is necessary to complete the crime; but the quantum of force is immaterial.

U. S. *v.* Fries, 3 Dall. (U. S.), 515; 9 Fed. Cas., No. 5126.
Charge to Grand Jury, 2 Wall., jr. (C. C.), 134; 30 Fed. Cas., No. 18276.

Persons engaged in forcibly opposing the execution of a draft commit the crime of treason.

Druecker *v.* Salomon, 21 Wis., 626.

The treasonable design need not be a direct and positive intention entirely to subvert and overthrow the Government. It will be equally treason if the intention is by force to prevent the execution of any one or more general and public laws of the Government or to resist the exercise of any legitimate authority of the Government in its sovereign capacity.

Law of Treason, 1 Story (U. S.), 614; 30 Fed. Cas. No. 18275.

If the object be to prevent by force the execution of any public law of the United States, generally and in all cases, that is a treasonable purpose, for it is entirely to overthrow the Government as to one of its laws. And if there be such an assemblage for the purpose of carrying such an intention into effect by force, it will constitute levying war. But the sudden outbreak of a mob, or the assembling of men in order, by force, to defeat the execution of the law, in a particular instance, and then to disburse without the intention to continue together, or to reassemble for the purpose of defeating the law generally, in all cases, is not levying war.

Charge of Grand Jury, 1 Sprague (U. S.), 602.
Charge of Grand Jury, 2 Sprague (U. S.), 292.

When the object of an insurrection is of a local or private nature, not having a direct tendency to destroy all property and all government by numbers and armed force, it will not amount to treason; and in these and other cases that occur, the true criterion is the intention with which the parties assembled.

U. S. *v.* Hoxie, 1 Paine (U. S.), 265.

The resistance of the execution of a law of the United States, accompanied with any degree of force, if for a private purpose, is not treason.

U. S. *v.* Hanway, 2 Wall. Jr. (C. C.), 139; 26 Fed. Cas., No. 15299.

The occupation of a fortress by a body of men in military array, in order to detain it against a government to which allegiance is due, is treason on the part of all concerned, whether in the occupation or in the detention of the post.

U. S. *v.* Greiner, 4 Phila., Pa., 396; 26 Fed. Cas. No. 15262.

There must, to constitute the crime, be a levying of war against the United States in their sovereign character, and not merely a levying of war exclusively against the sovereignty of a particular State.

Law of Treason, 1 Story (U. S.), 614; 30 Fed. Cas. No. 18275.

The term "enemies," as used in the second clause, according to its settled meaning at the time the Constitution was adopted, applies

only to the subjects of a foreign power in a state of open hostility with us. It does not embrace rebels in insurrection against their own government. An enemy is always the subject of a foreign power who owes no allegiance to our Government or country.

U. S. *v.* Greathouse, 4 Sawy. (U. S.), 457; 26 Fed. Cas. No. 15254.

What constitutes the overt act, under the clause "adhering to their enemies, giving them aid and comfort" must depend very much upon the facts and circumstances of each particular case. There are some acts of the citizen, in his relations with the enemy, which leave no room for doubt, such as giving him intelligence with intent to aid him in his acts of hostility, sending him provisions or money, furnishing arms or troops or munitions of war; surrendering a military post, all with a like intent. These and kindred acts are overt acts of treason by adhering to the enemy.

Law of Treason, 5 Blatchf. (U. S.), 549; 30 Fed. Cas., No. 18,271; Hanover *v.* Doane, 12 Wallace, 347.

Delivering up prisoners and deserters to an enemy is treason, and nothing but a well-grounded fear of life will excuse the act.

U. S. *v.* Hodges, 2 Wheel. Crim. (N. Y.), 477.

Words oral, written, or printed, however treasonable, seditious, or criminal of themselves, do not constitute an overt act of treason, within the definition of the crime; but are admissible as evidence of intent, as well as of the act itself, either in finding a bill of indictment or on the trial of it.

Law of Treason, 5 Blatchf. (U. S.), 549.

If war be actually levied, that is if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagues in the general conspiracy, are to be considered as traitors.

Ex parte Bollman, 4 Cranch, 126.
Law of Treason, 4 Blatchf. (U. S.), 518.
Charge of Grand Jury, 1 Sprague (U. S.), 602.
U. S. *v.* Burr, 25 Fed. Cas., No. 14,693.
Charge of Grand Jury, 2 Sprague, 285.
Druecker *v.* Salomon, 21 Wis., 626.

An alien, whilst domiciled in the United States, owes a local and temporary allegiance, which continues during the period of his residence, and he is amenable to the laws of the United States prescribing punishment for treason and for giving aid and comfort to rebellion.

Carlisle *v.* U. S., 16 Wall. (U. S.), 154.
Green's Case, 8 Ct. Cls., 412.

Treason is a breach of allegiance and can be committed by him who owes allegiance either perpetual or temporary.

U. S. *v.* Wiltberger, 5 Wheaton, 97.

The Confederate government was never acknowledged by the Government of the United States as a de facto government in the sense that adherents to it in war against the Government de jure did not incur the penalties of treason. From a very early period of

the Civil War to its close, it was regarded as simply the military representative of the insurrection against the authority of the United States.

Thorington *v.* Smith, 8 Wallace, 1.
Spratt *v.* U. S., 20 Wallace, 464.

In treason there are no accessories; all who engage in the rebellion at any stage of its existence, or who designedly give it any species of aid and comfort, in whatever part of the country they may be, stand on the same platform; they are all principals in the commission of the crime; they are all levying war against the United States.

U. S. *v.* Greathouse, 4 Sawy. (U. S.), 457.
Fries's Case, 9 Fed. Cas., No. 5127.

The provisions of the Constitution relating to the evidence necessary to convict of treason apply only to the trial of indictments, and are inapplicable to proceedings before grand juries or to preliminary examinations.

U. S. *v.* Greiner, 4 Phila. (Pa.), 396; 26 Fed. Cas., No. 15262.

Of the overt act of treason there must be proof by two witnesses, and if there be testimony by four witnesses that the defendant was at a certain place, at a great distance from his home, and that he was armed, that the conspiracy was formed at that place, and that the defendant was actually passed on the march to the place where the treasonable acts were to be carried out, the evidence is sufficient, even if there be testimony of only one witness as to his actual presence at the place of attack.

U. S. *v.* Mitchell, 2 Dall. (U. S.), 348; 26 Fed. Cas., No. 15788.

When a confession is made out of court, it is not itself sufficient to convict although proved by two witnesses.

U. S. *v.* Fries, 3 Dall. (U. S.), 515.
U. S. *v.* Greiner, 4 Phila. (Pa.), 396.

The intent may be proved by one witness, collected from circumstances, or even by a single fact.

U. S. *v.* Fries, 3 Dall. (U. S.), 515.

A declaration by one accused accompanying the overt act laid in the indictment may be given in evidence to show the intent with which the act was done.

U. S. *v.* Lee, 2 Cranch (C. C.), 104.
U. S. *v.* Fries, 3 Dall. (U. S.), 515.

What was intended by the constitutional provision prescribing punishment for treason is free from doubt. In England attainders of treason work corruption of blood and perpetual forfeiture of the estate of the person attainted, to the disinherison of his heirs or of those who would otherwise be his heirs. Thus innocent children were made to suffer because of the offense of their ancestor. When the Federal Constitution was framed, this was felt to be a great hardship, and even rank injustice. For this reason it was ordained that no attainder of treason should work corruption of blood or forfeiture except during the life of the person attainted.

Wallach *v.* Van Riswick, 92 U. S., 202.
Bigelow *v.* Forrest, 9 Wallace, 350.

The jurisdiction of the State courts does not extend to the offense of treason against the United States.

People *v.* Lynch, 11 Johns (N. Y.), 553.

HABEAS CORPUS.

"The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." (Art. I, sec. 9, clause 2.)

Suspension has been many times declared in Great Britain, or in some section of the British Empire, within the present century; sometimes in view of threatened invasion, and sometimes when risings among the people had taken place, or were feared, and when persons whose fidelity to the government was suspected, and whose influence for evil might be powerful, had as yet committed no overt act of which the law could take cognizance. It has been well said by May in his Constitutional History of England, Chapter II, that the suspension of the habeas corpus is a suspension of Magna Charta itself, and nothing but a great national emergency could justify or excuse it. The Constitution limits it within narrower bounds than do the legislative precedents in Great Britain. (Cooley.)

If at any time the public safety should require the suspension of the powers vested by statute in the courts of the United States to issue writs of habeas corpus, it is for the legislature to say so. The question depends on political considerations, on which the legislature is to decide.

Per Marshall, C. J., in ex parte Bollman, 4 Cranch, 101.
Ex parte Merryman, Taney (U. S.), 246.
Warren *v.* Paul, 22 Ind., 277.
Prigg *v.* Pennsylvania, 16 Peters, 619.
McCall *v.* McDowell, Deady (U. S.), 233.

Congress may authorize the President to suspend the writ of habeas corpus whenever in his judgment the public safety requires.

Ex parte Milligan, 4 Wallace, 115.
Matter of Dunn, 25 How. Pr., 467.
Matter of Oliver, 17 Wis., 686.

But, in case of an arrest of a person known to have criminal intercourse with insurgents by order of the President in a time of dangerous insurrection, the President is justified in refusing to obey a writ of habeas corpus requiring him or his agents to produce the body of the prisoner and show the course of his capture detention.

Suspension of Privilege of Writ of Habeas Corpus, 10 Op. Atty. Gen., 74.
See also in re Dugan, 6 D. C., 139.

And the President had the power, in the military exigencies of the country during the Civil War, to proclaim martial law, and, as a necessary consequence thereof, the suspension of the writ of habeas corpus in the case of military arrests. Martial law and the privilege of that writ are wholly incompatible with each other.

Ex parte Field, 5 Blatchf. (U. S.), 63; 9 Fed. Cas. No. 4, 761.
But see U. S. *v.* Porter, 2 Hayw. & H. (D. C.), 394; 27 Fed. Cas., No. 16074a.

An arrest and detention under an order of the War Department, entitled "Persons discouraging enlistments to be arrested," before any attempt made to establish martial law, was held to be in direct violation of this clause.

Ex parte Field, 5 Blatchf. (U. S.), 63.

Congress may suspend the privilege of the writ generally or in particular cases; and it may suspend it directly, or it may commit the matter within the proper limits, to the judgment of the President of the United States.

McCall *v.* McDowell, Deady (U. S.), 233.
Matter of Oliver, 17 Wis., 686.

It is only when, in cases of rebellion or invasion, the public safety may require it, that the privilege of the writ can be suspended. There is no other restriction.

Matter of Keeler, Hempt (U. S.), 306; 14 Fed. Cas. No. 7, 637.
People *v.* Gaul, 44 Barb (N. Y.), 105.
Ex parte Merryman, Taney (U. S.), 246; 17 Fed. Cas., No. 9, 487.

Congress has power to protect officers and persons engaged or concerned in making arbitrary arrests and imprisonments, or arrests or imprisonments without ordinary legal warrant or cause, under the authority and in pursuance of an act suspending the writ of habeas corpus, by the passage of laws indemnifying such officers and persons against the ordinary legal consequences thereof, or declaring that they shall not be liable to an action or other legal proceeding therefor.

McCall *v.* McDowell, Deady (U. S.), 233.
Freeland *v.* Williams, 131 U. S., 405.
Drekman *v.* Stifel, 8 Wallace, 505.

But, as a right of action arising under the principles of the common law is property as much as tangible things, it is not believed the right can be destroyed by statute. The suspension of the writ does not legalize a wrongful arrest and imprisonment; it only deprives the party thus arrested of the means of procuring his liberty, but does not exempt the person making the illegal arrest from liability to damages, in a civil suit, for such arrest, nor from punishment in a criminal prosecution.

Griffin *v.* Wilcox, 21 Ind., 372.
Johnson *v.* Jones, 44 Ill., 142.
Milligan *v.* Hovey, 3 Biss., 1.

The State governments have, in their sovereign capacity, full authority of the writ of habeas corpus, and the Federal Government is inhibited from suspending its privileges, except in case of rebellion or invasion. This power to suspend the writ was necessary to be vested in Congress, because in such cases it might become essential to the preservation of the United States Government, or that of a State or States. But it is only in case of rebellion or invasion that the General Government can interfere with the privileges of the writ.

Baquall *v.* Ableman, 4 Wis., 167.
Matter of Booth, 3 Wis., 157.
Luther *v.* Borden, 7 Howard, 1.

Neither the President nor Congress has power to suspend the issuing of the writ of habeas corpus by a State court.

Griffin *v.* Wilcox, 21 Ind., 383.

This does not apply, of course, where martial law has been declared.